# No. 5736

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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ARVID PEARSON and A. J. HENNESSY,
*Appellants,*

vs.

A. W. HIGGINS, as Trustee in Bankruptcy of Louis Morgan (a Bankrupt),
*Appellee.*

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## REPLY BRIEF FOR APPELLANTS.

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## REPLY BRIEF FOR APPELLANTS.

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### I.

### CONCLUSIVE POINTS NOT ANSWERED IN BRIEF OF APPELLEE.

Surely no one can reasonably contend that the brief of the appellee furnishes in law or in fact even a semblance of an answer to any one of the many conclusive points urged in the brief for appellants, nor that the appellee has cited even one authority having as much as the remotest application favorable to him in the case presented by the record on this appeal. The following determinative points urged in appellants' brief and there sustained by principle and authority, are left entirely unanswered by the appellee, viz.: (1) That the property in con-

troversy is shown by the record to be partnership property, and this by reason of the absence of any traverse or denial of the averments in the sworn plea to the jurisdiction and in the sworn petition for review, showing the fact that it is partnership property. This conclusive point in the case is presented and the authorities clearly sustaining it are cited in the brief for appellants at pages 9 and 10. (2) That the bankruptcy court is denied jurisdiction of partnership property in the case of a voluntary petition of but one of the partners individually, *the case here.* This conclusive point is presented and the authorities clearly sustaining it are cited in the brief for appellants at pages 10 and 20. Having no jurisdiction of partnership property, the order for its delivery to the trustee in bankruptcy of the individual partner, is clearly void. (3) The property in controversy being partnership property, and as such not subject to the jurisdiction of the bankruptcy court, the jurisdiction of the State Court in the claim and delivery action *and its custodia legis of the property only as partnership property,* during the pendency of the action, is paramount, supreme and exclusive. (4) That even if this were not the law, as the property is actually in the *custodia legis* of the State Court in the claim and delivery action, distinctly so held by the authorities cited at page 19 of appellants' brief, and was in such custody at the time of the filing of the trustee's petition in the summary proceedings before the referee for possession of the property, there was no right in the bankruptcy court to take possession of the property, even if it were not partnership prop-

erty, until the trustee had first made application to the State Court for the possession, and the application had been denied. The point is presented at pages 2 and 3 of appellants' brief. (5) The property being in the custody of the State Court at the time Morgan filed his voluntary petition in bankruptcy, and at the time he was adjudged bankrupt, such *custodia legis* resulting from the levy of the execution in *Pulin v. Morgan,* the doctrine of caveat, attachment and injunction by implication or operation of law incidental to the petition and adjudication in bankruptcy, and referred to in *International Bank v. Sherman,* 101 U. S. 407 and *Muller v. Nugent,* 184 U. S. 10, can have no application, for as held by the Supreme Court,

> "since the possession of the sheriff was the possession of the state court, the trustee's claim to the property would, under general principles of law, have to be litigated in the state court. * * * In this case the sheriff had, before the filing of the petition in bankruptcy, taken exclusive possession of the property, and he had retained such possession and control after adjudication and the appointment of the trustee. The bankruptcy court therefore, did not have actual possession of the res. The adverse claim of the judgment creditor was a substantial one. The bankruptcy court, therefore, did not have constructive possession of the res. Neither the judgment creditor or the sheriff had become a party to the bankruptcy proceedings. There was no consent to the adjudication by the bankruptcy court of the adverse claim. The objection to the jurisdiction was seasonably made and was insisted upon throughout. The bankruptcy court therefore, did not acquire jurisdiction over the controversy in summary proceedings. Nor did it otherwise."
>
> *Taubel v. Fox,* 264 U. S. 426, 430, 437, 438.

Of course it would be immaterial that in the case cited, the sheriff retained possession until after the appointment of a trustee, for the decisive point is that he as sheriff of the State Court had the possession at the time of the filing of the petition in bankruptcy and at the time of the adjudication. This custody by the State Court prevented the bankruptcy court from having the necessary jurisdictional possession, to wit: constructive possession of the property, for as held in *Bailey v. Baker Ice Machine Co.,* 239 U. S. 268, 275, 276, it is the time of the filing of the petition in bankruptcy that the law has fixed "as the line of cleavage," relative to the jurisdictional possession, actual and constructive, of property claimed by the bankrupt or his trustee. To the same effect see *Taubel v. Fox,* 264 U. S. 432, 433, and *Bank v. Sherman,* 101 U. S. 403, 406. (6) The failure to allege in the trustee's petition in the summary proceedings before the referee, that the adverse claim of the appellant Pearson to the boat as partnership property, is *merely colorable,* requires as a matter of law that it be held that it is not merely colorable but is real, substantial and *bona fide,* and therefore can only be litigated in a plenary suit in the State Court. The point is presented and the authorities cited at pages 14 and 27 of appellants' brief. It is held by the authorities cited at pages 13 and 14 of the brief, that in such a case the bankruptcy court and its referee have no jurisdiction in summary proceedings to order the adverse claimant to deliver possession of the property to the trustee, and it is held by the same authorities that the jurisdiction to determine the ques-

tion of title is exclusively in a plenary suit in the State Court, under section 23 of the Bankruptcy Act, and the judgment of the State Court will be *res judicata* on the bankruptcy court, as held by the authorities cited at page 21 of appellants' brief.

(7) It is held to be and undoubtedly is a violation of the "due process of law" clause in the Fifth Amendment of the Constitution of the United States to order in summary proceedings that appellants surrender possession of the boat to the trustee, without allegation, proof or decision or adjudication or other judicial determination that the boat is not partnership property of the bankrupt and appellant Pearson, or that the adverse claim of Pearson to it and to its possession as partnership property is merely colorable and not real, substantial and *bona fide.* The point is presented and the authorities fully sustaining it are cited in appellants' brief, pages 17, 22 and 23. *Clearly, and according to the authorities cited at pages 13 and 14 of appellants' opening brief, there can be no jurisdiction in the bankruptcy court, or its referee, to order delivery of possession of the boat to the trustee, without first determining whether the adverse claim of appellant Pearson to the boat as partnership property is merely colorable and not real, substantial and bona fide.* And this the bankruptcy court has not done in the instant case; nor can it do so until it has at least a constructive possession of the boat. It is not necessary that it have actual possession for the purpose. It cannot have the requisite constructive possession if the boat is partnership property, nor if it was not in actual possession of the bankrupt at the time of

the filing of his petition or when the adjudication was made, but was then in a valid *custodia legis* of the State Court, as shown by the record (R. 30, 34), nor if the adverse claim to the boat as partnership property, is *as conceded in the record,* and as held by the authorities cited at pages 14 and 27 of appellants' opening brief, a real, substantial and *bona fide* claim and not merely colorable.

*Taubel v. Fox,* 264 U. S. 426, 437, 438.

Not one of the foregoing specified seven determinative and conclusive points in the case is answered in the brief of the appellee by any contention there made, nor by any authority there cited, nor do the counsel for the appellee make the least attempt to furnish an answer to any one of the points. This no doubt because the points are decisive of the case and unanswerable.

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## II.

### POINTS URGED BY APPELLEE ARE DESTITUTE OF MERIT.

Now as to the points and the authorities cited in the brief for the appellee: (1) It is there contended that the action in claim and delivery, filed in the State Court by appellant Pearson, is an illegal interference with the jurisdiction of the bankruptcy court and comes within the doctrine of the *Schloerb* case in 3 Am. B. R. 224 and 178 U. S. 542, 546, 547. We have cited that case at pages 20 and 21 of appellants' opening brief and there stated the reasons why it is not in point, principally in that the boat

in the instant case was never in the possession, actual or constructive of the bankruptcy court or its referee, and that *as partnership property,* such possession is prohibited by subdivision *h* of section 5 of the Bankruptcy Act of 1898 as construed by the authorities cited at pages 10 and 20 of appellants' brief. It results that the action in claim and delivery in the State Court, affirmatively showing as it does that it is jurisdictionally and exclusively confined to and based on the fact that the boat *is partnership property* (R. 8, 9, 10), is not an invasion of, nor interference with the jurisdiction of the bankruptcy court respecting the individual property of the bankrupt Morgan, the jurisdiction in bankruptcy in his case, confessedly not extending to nor embracing within its authority the partnership property. *As to the partnership property, the jurisdiction of the State Court is clearly exclusive, paramount and supreme, no matter from what angle the case is viewed.* Not only is there no jurisdiction in the bankruptcy court, of the boat *as partnership property,* but the Court did not have either the actual or constructive possession of the boat at the time the Morgan petition in bankruptcy was filed and he individually, but not the partnership, adjudged bankrupt, such being the very point of time made necessary to the bankruptcy court's jurisdiction as the "line of cleavage" referred to in *Bailey v. Baker Ice Machine Co.,* 239 U. S. 268, 275, 276; *Acme Harvester Co. v. Beckman Lumber Co.,* 222 U. S. 300, 307, in matters of jurisdiction, for the boat was then in the valid custody of the State Court under its writ of execution in *Pulin v. Morgan* (R. 30, 34),

and therefore did not when subsequently taken into his possession by Morgan *as a copartner of Pearson,* nor even were Morgan's possession an individual one, go into the constructive possession of the bankruptcy court, for the scope and extent of its constructive custody is limited to the time of the filing of the petition, or at most, to the time of the adjudication. It follows that as a matter of well settled law, the three questions stated at pages 3 and 4 of the appellee's brief must be answered in the negative. It is not true that the question before the Court in the *Schloerb* case was whether "a plaintiff in replevin is entitled to hold the property seized by the sheriff as against the trustee in bankruptcy, where the action in replevin was instituted after the adjudication in bankruptcy," but the question and only question was whether property of the bankrupt in his possession at the time the petition in bankruptcy was filed and adjudication made, and thereupon taken into the actual possession of the bankruptcy court and its referee, can be taken on a writ of replevin from the State Court. The question is so stated by the Supreme Court at pages 546 and 547 of 184 U. S., in the SCHLOERB CASE. *Such is not the instant case,* and this is true whether the boat is partnership property or the individual property of the bankrupt, since it was admittedly in the valid custody of the State Court when Morgan's petition was filed and he adjudicated a bankrupt. *This is the time constituting the line of cleavage in matters of bankruptcy jurisdiction.* Therefore the subsequent release of the boat from the State Court's custody, under its execution in *Pulin v. Mor-*

*gan,* could not and did not place it in the constructive custody of the bankruptcy court, especially it being partnership property. In the *Schloerb* case, the Supreme Court stresses the point that the property there involved was in the actual possession of the bankrupt as his property at the time of the filing of the petition and at the time of the adjudication, (the line of jurisdictional cleavage), and was actually taken into possession by the bankruptcy court and its referee, which admittedly is not the case here, respecting the boat in controversy. Nor is it the case here that the boat was attached between the time of the filing of Morgan's petition in bankruptcy and the time of the adjudication as erroneously though impliedly asserted at lines 25 and following on page 6 of the appellee's brief. On the contrary, the record shows clearly that the boat was taken into the custody of the State Court under its writ of execution in *Pulin v. Morgan,* more than six days *prior* to the filing of the petition in bankruptcy and was in the State Court's valid custody at the time the petition was filed and the adjudication made. (R. 30, 34.) And as held in *Taubel v. Fox,* 264 U. S. 426, 430, 438, and *Liberty Nat. Bank v. Bear,* 265 U. S. 365, 368 to 371, the adjudication in bankruptcy did not disturb the State Court's custody of the boat, nor give to the bankruptcy court the necessary constructive custody as of the time its jurisdiction vested, to wit: the date of the filing of Morgan's petition and of the adjudication, which were on the same day. (R. 30.) There is a rather enigmatical reference at lines 23 and following, of page 7 of the appellee's brief, about dis-

solving a partnership by an action in replevin. Such is not the case. The partnership was dissolved by the bankruptcy of Morgan, (Civil Code Cal., sec. 2450, subd. 4; Parsons on Partnership, 4th ed., secs. 304, 366, 367, 368, 369; 30 Cyc., 654, 655; 20 Cal. Jur., 800.) Necessarily the solvent partner is entitled to the possession of the partnership property for purpose of liquidation, not only under section 2459 of the Civil Code of California, but by authority of subdivision *h* of section 5 of the Bankruptcy Act of 1918. (20 Cal. Jur. 807; *Williams v. Lane,* 158 Cal. 39, 44.) The solvent partner has not only a greater right than any other person claiming title as against the trustee in bankruptcy, but by the final clause in section 5 of the Bankruptcy Act of 1898, as construed by the authorities cited at pages 10 and 20 of appellants' brief, the bankruptcy court has no jurisdiction of partnership property on a petition by and adjudication against an individual partner. None of the cases cited in the brief of the appellee hold that the *trial* of title to property found in the possession of the bankrupt "during the interim between the filing of the petition and the election of a trustee must be had in the bankruptcy court," but on the contrary they hold that the jurisdictional line of cleavage is at utmost the date of the adjudication (*Everett v. Judson,* 228 U. S. 474, 479; *Lazarus v. Prentice,* 234 U. S. 263, 266, 267; *Bailey v. Baker Ice Machine Co.,* 239 U. S. 268.) And the many authorities cited at pages 13 and 14 of appellants' brief hold that under section 23 of the Bankruptcy Act of 1898, the bankruptcy court has no jurisdiction to hold *trial* of an adverse

claim of title, not merely colorable, but substantial, real and *bona fide,* and that the trial jurisdiction in such a case is exclusively in the State Court and in a plenary suit. To the same effect is *Mueller v. Nugent,* 184 U. S. 1, 15, 16, and *Louisville Trust Co. v. Cominger,* 184 U. S. 24, 25, 26. The contention of counsel for appellee to the contrary of the ruling in these cases, is also in conflict with all the many authorities on the point. The case of *Lazarus v. Prentice,* 234 U. S. 263, 266, 267, cited at page 8 of their brief, does not in the slightest degree tend to sustain their plainly erroneous views on the subject.

(2) It is a conclusive answer to appellee's contention respecting the *custodia legis* of the State Court, that the latter originated six days *prior* to the filing of the Morgan petition in the seizure of the boat on execution. (R. 30, 34.) And the subsequent *custodia legis* of the State Court in the claim and delivery action is based entirely and expressly and exclusively *upon the jurisdictional fact that the boat is partnership property* (R. 8, 9), and as such excluded by section 5, subd. *h* of the Bankruptcy Act of 1898, from the jurisdiction of the bankruptcy court in the case of Morgan. This answers conclusively the first proposition of the argument put forth by appellee's counsel at page 9 of their brief. *The boat never was in the actual or constructive custody of the bankruptcy court, and therefore could not and was not taken from its custody at any time.* Therefore the entire case of the appellee fails at its very foundation, its basis being the utterly unsustainable one, that the boat was taken from the constructive custody

of the bankruptcy court by the action in claim and delivery and therefore under the ruling in *White v. Schloerb,* 178 U. S. 542, can be ordered returned or delivered to the trustee, regardless of any adverse claim of title to it. *Such is not the case here, on the facts or the law.*

(3) In answer to the appellee's point that *after the adjudication* in bankruptcy and because of it, the sheriff released his execution levy on the boat and that then the bankrupt took possession of it, we insist that this is immaterial in the decision of the questions presented by appellants, as it concedes the undisputed fact that at the time the petition was filed and adjudication made, the boat was not and could not be in the constructive custody of the bankruptcy court, and this for two conclusive reasons, to wit: it was then in the valid *custodia legis* of the State Court, as admitted by the referee (R. 34), under its writ of execution in *Pulin v. Morgan,* and in any event it being partnership property, the Bankruptcy Act denies the bankruptcy court custody and jurisdiction of the boat, as held by the authorities cited at pages 10 and 20 of appellants' brief. We again point out that by the omission of the trustee to file an answer denying the averments of the sworn plea to the jurisdiction and of the sworn petition for review, that the boat is partnership property, he is deemed to admit that it is. It is so held by the authorities cited at pages 9 and 10 of appellants' brief. The fact that after the sheriff had without authority in law, released the boat from the execution levy, solely because of the adjudication in bankruptcy and in violation of the law as construed

by the Supreme Court in *Liberty Nat. Bank v. Bear,* 265 U. S. 365, 368 to 371, is manifestly immaterial and it is equally immaterial, that after the unauthorized release, Morgan took possession of the boat. He would then hold it, not for the trustee, nor for the bankruptcy court, but solely for the solvent partner, the appellant Pearson. It is not our contention that the bankruptcy court has not "paramount jurisdiction" of property of the bankrupt in his possession at the time of either the filing of the petition or at the time of the adjudication; but we do contend that the Court has no jurisdiction of partnership property on an adjudication restricted to an individual partner, and not including the partnership, and we do contend that the Court has no constructive custody of property not in the possession of the bankrupt at the time of the filing of the petition nor at the time of the adjudication, but then in a valid *custodia legis* of the State Court, although undoubtedly it has jurisdiction of all the property of the bankrupt not exempt from execution if owned by him at said time, but not of property acquired by him after the adjudication, nor of property not belonging to him. Of course the bankruptcy court would have jurisdiction of the boat if it were the individual property of Morgan, and on that theory if it had the requisite constructive or actual possession (*Taubel v. Fox,* 264 U. S. 426, 432, 433, 434), could in summary proceedings, competently adjudge whether an adverse claim of title to it is *merely colorable* and if held to be *not* merely colorable, but real, substantial and *bona fide,* the trustee would be required to bring a plenary

suit in the State Court to have determined the question of title, and to recover possession of the boat, if entitled to it, as held in *Mueller v. Nugent,* 184 Cal. 1, 15, 16 and in *Louisville Trust Co. v. Cominger,* 184 U. S. 18, 24, 25, 26 and by the many other authorities cited at pages 13 and 14 of appellants' opening brief. The *bankruptcy court* would have no jurisdiction to determine in such a case the question of title. As said by the Supreme Court:

> "But in no case where it lacked possession, could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding, the validity of a substantial adverse claim. In the absence of possession, there was under the Bankruptcy Act of 1898 as originally passed, no jurisdiction, without consent, to adjudicate the controversy even by a plenary suit."

And the Court proceeds and holds that no such jurisdiction exists under the Bankruptcy Act as it now stands, in cases such as the instant one.

Taubel v. Fox, 264 U. S. 433, 434.

Either the bankruptcy court has or it has not *constructive* custody of the boat in controversy in the instant case. If it has not such constructive possession, (it is conceded by the appellee that it never had actual or physical possession of the boat), there is no jurisdiction to determine in either summary proceedings or plenary suit before it the question of title, nor the one of Pearson's adverse claim, whether merely colorable or not. If it has constructive possession of the boat, then it has competent jurisdiction in summary proceedings to determine without having actual

or physical possession of it, whether Pearson's adverse claim is merely colorable, and if it is, to order him to deliver possession of the boat to the trustee; *but in no event would the bankruptcy court have competent jurisdiction to make the "turn over" order, until it had first legally determined on the basis of the essential and necessary constructive possession of the boat, that Pearson's adverse claim to it as partnership property, was merely colorable.* Therefore and according to the authorities we have cited at pages 13 and 14 of appellants' brief, the bankruptcy court and its referee would have *no jurisdiction* to do what was done in the instant case, to wit: make the "turn over" order in summary proceedings *without any allegation, proof or decision that Pearson's adverse claim to the boat is merely colorable.* Manifestly there is no jurisdiction in the bankruptcy court nor in its referee to make the "turn over" order as against the adverse claim of Pearson, solely for the purpose of getting actual and physical possession of the boat in a case where the Court had no constructive possession of it, so that the Court might *thereafter* and in summary proceedings based on such actual possession, determine whether the adverse claim is merely colorable or not. To take the boat from the adverse claimant in such circumstances *and without any prior allegation, proof or decision that Pearson's adverse claim to the boat as partnership property, is merely colorable,* is clearly a violation of the due process of law" clause of the Fifth Amendment of the Constitution of the United States, as held by the authorities cited at pages 17, 22 and 23

of appellants' brief. And to the same effect is the decision of the Supreme Court in *Louisville Trust Co. v. Cominger,* 184 U. S. 18, 25. It is certainly not the law that "the bankruptcy court has jurisdiction to determine all adverse claims to all property found in the possession of the bankrupt and that jurisdiction is by summary proceeding," unless of course the bankrupt had such possession at the time he filed his petition or at the time of the adjudication. And in no case would the Court have such jurisdiction any further than to determine whether the adverse claim is merely colorable, and in no case would the Court have jurisdiction to make a "turn over" order, until it had first adjudged that such is the character of the claim;—*a necessary jurisdictional prerequisite not existing in the instant case.* Therefore the "turn over" order in question here is void for want of jurisdiction, and should be so held. It will be found that all the authorities cited in appellants' brief are directly in point and fully sustain the various propositions of law and the relevancy of all the propositions of fact urged in support of the appeal and in support of the prayer for reversal of the order and decree appealed from. There is nothing to the contrary in any of the six or seven cases cited in the brief of the appellee. To the extent they are pertinent, they sustain our contention. It is true but irrelevant here that the same attorney who appeared for the judgment creditor in *Pulin v. Morgan,* and at a time prior to the filing of Morgan's petition in bankruptcy and since, is also one of the attorneys for the appellant Pearson the solvent partner of Morgan. Clearly there is nothing

inconsistent in this as Morgan's interest in the partnership was subject to the levy of the execution in *Pulin v. Morgan,* at the time the sheriff levied it, to wit: *prior* to the filing of the petition in bankruptcy. The partner's share is always subject to levy on execution prior to the filing of a petition in bankruptcy. (20 Cal. Jur. 858.) And when Morgan was adjudged bankrupt, the attorney for the judgment creditor had a perfect right to represent and act for the solvent partner in contesting by appropriate litigation in the State Court and by appropriate proceeding and plea before the referee and in the District Court, the void claim of Morgan's trustee to partnership property.

Of course in representing the judgment creditor prior to the adjudication in bankruptcy, the attorney was not representing the solvent partner and in representing the latter he was not also representing the judgment creditor. There is obviously no conflicting interests involved. The right of Morgan's judgment creditor is restricted to Morgan's individual interest in the partnership property, he not being a creditor of the partnership, and if he were a partnership creditor, his rights would be protected by the solvent partner as required by law. The judgment creditor Pulin never did contend that the boat is the individual property of Morgan and not partnership property.

## III.

### CONCLUSION.

In conclusion, the "turn over" order of the referee is clearly void for want of jurisdiction, in the particulars we have sufficiently specified in this and the opening brief of appellants. The bankruptcy court, if it has actual or constructive possession of property alleged to be owned by the bankrupt individually, is given jurisdiction in summary proceedings to determine whether an adverse claim to the property as being partnership property, is merely colorable or not; but this jurisdiction is dependent on the Court having actual or constructive possession of the property either at the time of the filing of the petition or at the latest, at the time of the adjudication. This essential prerequisite to the Court's jurisdiction, does not exist if the property is then in a valid *custodia legis* of the State Court, as in the instant case. Afterwards it is not possible for the necessary jurisdictional possession to exist as a competent basis for summary proceedings in the bankruptcy court, but of course the trustee can bring and maintain a plenary suit in the State Court, pursuant to section 23 of the Bankruptcy Act, to enforce his right to the property, if he has any such right. These propositions are well settled law as held by the authorities cited at pages 13 and 14 of appellants' brief. In addition, we have in the record in the instant case, the conclusive fact that by omitting to deny the averments in the plea to the jurisdiction and in the petition for review, that the boat in dispute is partnership property, the law deems it to be such. It is so held by the authorities

cited at page 9 of appellants' brief and is undoubtedly the well settled law on the point, and being partnership property, it results, as held by the authorities cited at pages 10 and 20 of the brief, that the bankruptcy court has no jurisdiction to order the boat delivered to the trustee. In addition to this we have the conclusive point that as it is not alleged in the petition of the trustee in the summary proceedings, nor decided by the referee, nor in evidence in the case, that the adverse claim of Pearson to the boat as partnership property is merely colorable, the law holds *it is not, and deems it real, substantial and bona fide;* it is so held by the authorities cited at pages 14 and 27 of appellants' opening brief. Therefore neither the bankruptcy court or its referee would have jurisdiction of the boat, nor right to its possession, but the law requires the trustee to bring plenary suit in the State Court, pursuant to section 23 of the Bankruptcy Act, to recover it, if it is not partnership property. It is so held by the authorities cited at pages 13 and 14 of appellants' brief. It results for this reason also, that the referee's order directing the delivery of the boat to the trustee, is void for want of jurisdiction, it being the well settled law that competent jurisdiction to make such an order in summary proceedings, does not exist unless it be first alleged, proved and decided that the adverse claim to the boat as partnership property, is merely colorable. *This is a jurisdictional prerequisite having no existence in the instant case.* Without it, the order giving possession of the boat to the trustee, is clearly the denial of the "due process of law," required by

the Fifth Amendment, as held by the authorities cited at pages 17, 22 and 23 of appellants' opening brief.

*Louisville Trust Co. v. Cominger,* 184 U. S. 18, 25.

The conclusion based on principle and authority is that the *jurisdiction* of the bankruptcy court or its referee to make a "turnover" order such as the one here in question, in a case where there is an adverse claim to the property, is restricted to property in the actual or constructive possession of the court or its referee, or in other words to property in the possession of and claimed by the bankrupt as his at the time of the filing of his petition in bankruptcy or at the time he was adjudged bankrupt. And in such cases the court's jurisdiction is strictly limited to determining in summary proceedings whether the adverse claim to the property is *merely colorable* and not real, substantial and *bona fide.* If the adverse claim be held not merely colorable, but to be real, substantial and *bona fide,* then the jurisdiction to determine the issue of title is *exclusively* in the state courts, in a plenary suit, and their decision will be *res judicata* on the bankruptcy court. And in no case has the latter court or its referee, competent jurisdiction to order the property delivered to the trustee, until it has been first decided that the adverse claim is *merely colorable,* except in the one case where the property was unlawfully taken from the actual possession of the bankruptcy court and its referee, as in *White v. Schloerb,* 178 U. S. 542, 546, 547, which is not the case here. (See also *Metcalf v. Barker,* 187 U. S. 165, 176 and *Hinds v. Moore,* 134 F. 221, 223, 224.) Nor would

the bankruptcy court have jurisdiction of, or any right to the possession of partnership property, nor any constructive possession of partnership property, on a petition of and adjudication against only one of the partners and not including the partnership.

It is respectfully submitted that the decree appealed from is clearly erroneous in the particulars and for the reasons we have given in our briefs and that therefore it should be *reversed* with direction to annul the void order of the referee for delivery of the boat to the appellee.

Dated, San Francisco,
June 22, 1929.

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